

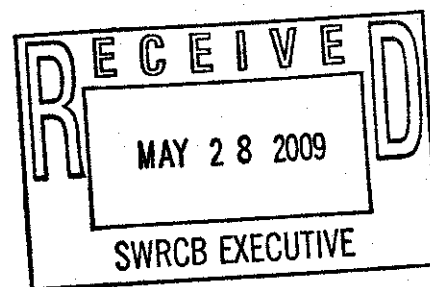


Association of California Water Agencies

Leadership Advocacy Information Since 1910

May 28, 2009

Mr. Charlie Hoppin, Chair
State Water Resources Control Board
Attn. Ms. Jeanine Townsend
1001 "I" Street
Sacramento, California 95814



RE: Water Quality Enforcement Policy Workshop, June 4, 2009

Dear Mr. Hoppin:

The Association of California Water Agencies ("ACWA") submits the following comments regarding the "Mandatory Minimum Penalties for NPDES Violations" section of the draft Water Quality Enforcement Policy, ("Enforcement Policy"), dated May 6, 2009, at pages 27-32. ACWA represents nearly 450 public agencies that collectively provide 90 percent of the water for agricultural, business and residential use throughout California. Our members and their customers rely on a predictable and affordable supply of water for human consumption as well as commercial and agricultural use.

ACWA members are very concerned with the existing process for levying Mandatory Minimum Penalties ("MMPs"). Currently MMPs are imposed against a NPDES permittee who fails to file a quarterly monitoring report in a timely manner, without giving any consideration to the impact (or lack thereof) to water quality. It is worth noting that the vast majority of violations issued to ACWA members did not involve any discharge into the waters of California. While, the threat to water quality is nonexistent, the current compounding process for MMPs can result in very significant costs over a very short period of time. For example, nineteen water suppliers within the Los Angeles Regional Water Quality Control Board's ("LARWQCB") jurisdiction were issued Notices of Violation ("NOVs") that total more than \$3,000,000. In one instance an individual water supplier was assessed MMPs exceeding \$625,000. While the alleged violations extend back to 2005, the LARWQCB did not begin issuing NOVs until early 2008. During the interim period MMPs continued to mount. The water suppliers we communicated with promptly filed the missing reports once they received the NOVs from the LARWQCB. Approximately ninety percent of the alleged violations involved quarters in which no discharge occurred. Of the remaining NOVs, none of the discharges, that we are aware of, exceeded any discharge limitation.

Given this background, ACWA offers the following comments:

1. Applying MMPs to Those Situations That Do Not Involve Any Discharge

ACWA fully appreciates the efforts by your staff to address our most significant concern, namely the issuance of NOV's and associated MMPs when no discharge occurred during the monitoring period. We agree with the revised language on page 31 that concludes "[a] report that is required to be submitted to document that no discharge to surface waters occurred during the relevant period is not a 'discharge monitoring report' for purposes of section 13385.1(a)." We also concur with the proposed language directing the Regional Water Boards not to take final action to impose MMPs if the permittee submits a written statement explaining that no discharge occurred during the quarterly monitoring period and states the reason(s) why the report was not submitted by the required deadline.

We believe that the proposed language provides a reasonable resolution for those situations involving no discharge and consequently no possible harm to water quality. We encourage the Board to adopt the proposed revisions on pages 31 and 32.

2. Applying MMPs to Those Situations Involving Discharges That Do Not Exceed Discharge Limitations.

ACWA acknowledges that situations involving a discharge(s) during the monitoring period are less clear-cut than the situations involving no discharge. We believe that when the monitoring data and report clearly demonstrate that none of the discharges exceeded any discharge limitation, and consequently did not adversely impact water quality, it is reasonable for a Regional Water Board to conclude that the failure to file a monitoring report in a timely manner, at most, constitutes a ministerial, *de minimis* violation rather than a "serious violation" under section 133851, requiring the imposition of MMPs.

ACWA encourages the State Board to adopt language in the final Enforcement Policy to provide Regional Water Boards with the flexibility to determine, on a case-by-case basis, whether a failure to timely file a monitoring report involving discharges that do not exceed discharge limitations constitutes a ministerial violation as opposed to a serious violation requiring MMPs. If the Board concludes that under current legislation it lacks such authority, ACWA encourages the State Board to pursue the necessary amendments to existing statutory language. ACWA would be more than happy to assist in your effort to secure the necessary amendments in the Legislature.

3. Lack of Notification Requirement

Page 8 of the draft Report states that "mandatory actions should be taken, within 18 months of the time that the violations qualify as mandatory minimum penalty violations." Page 27 provides that "[t]he Water Boards should issue MMPs within eighteen months..." In other words, Regional Water Board staff have up to eighteen months before they are obligated to take any action, including notifying the permittee of an

ongoing violation. During that eighteen-month period penalties continue to accrue against the permittee, at a rate of \$3,000 per month, for each quarter in which a report is not filed. As has been the case for most ACWA members, the permittee may not even be aware of the alleged violations.

ACWA encourages the State Board to include language into the final Water Quality Enforcement Policy requiring staff to notify permittees of permit violations before imposing MMPs. If the overarching goal of the MMP section is to ensure quarterly monitoring reports are filed in a timely manner, it is only reasonable that staff timely notify a permittee when a violation is occurring. Allowing for an eighteen-month period before staff is obligated to take any action seems inconsistent.

4. Calculating MMPs

The current draft does not propose to revise how MMPs are calculated. California Water Code section 13385.1 generally states that the failure to file a discharge report constitutes a "serious violation" to which MMPs apply. Each failure to file a quarterly monitoring report is an individual violation with a \$3,000 MMP. Additional MMPs accrue at \$3,000 for each subsequent 30-day period for which the report is not filed. The total penalties can quickly add up, especially if the Regional Water Board staff fails to inform the permittee for eighteen months.

Given the ministerial nature of the violation and the lack of any environmental harm, we believe that adequate notification and a single penalty, if warranted, should eliminate future failures to file monitoring reports. ACWA encourages the State Board to adopt such policy language.

This concludes ACWA's comments. We thank you for considering our comments and proposed revisions to the State Board's Enforcement Policy. We also appreciate the efforts of your staff to address our most significant concerns. If you have any questions regarding our comments please do not hesitate to contact me at (916) 441-4545, or by e-mail at markr@acwa.com.

Sincerely,



Mark S. Rentz, Esq.
Director of Regulatory Affairs